BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD

CENTRAL PUGET SOUND REGION

STATE OF WASHINGTON

KENMORE MHP LLC, JIM PERKINS, and KENMORE VILLAGE MHP, LLC,

Petitioners,

v.

CITY OF KENMORE,

Respondent.

CASE No. 19-3-0012

ORDER ON CITY'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter comes before the Board pursuant to the City of Kenmore's Motion for Summary Judgment. The Board has before it the following submittals from the parties:

- City of Kenmore's Motion for Summary Judgment;
- Declaration of Kelly Chelin in Support of the City of Kenmore's Motion for Summary Judgment;
- Petitioners' Opposition to City's Motion for Summary Judgment;
- Declaration of Richard M. Stephens in Support of Opposition to City's Motion for Summary Judgment;
- City of Kenmore's Reply Supporting its Summary Judgment Motion;
- Declaration of Dawn Reitan in Support of the City of Kenmore's Reply Supporting its Motion for Summary Judgment.

II. STATEMENT OF FACTS

- On Nov. 26, 2018, the City Council adopted Ordinance No.18-0476 which amended their comprehensive plan to: 1) amend the Land Use (LU) element, Policy 2.1.2 to create a Manufactured Housing Community (MHC) Land Use/Zone District; 2) adopt MHC LU Element Policies and 3) amend Figure LU-3, the Kenmore Land Use Plan, to re-designate two existing mobile home parks to MCH.
- There was no timely appeal of Ordinance No.18-0476 and it became final and

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valid.

- On April 15, 2019, the City of Kenmore adopted Ordinance No. 19-0481 in order to implement and align the City's zoning code with the comprehensive plan amendments that were adopted in Ordinance No. 18-0476.
- On April 18, 2019, Ordinance No. 19-0481 was published.
- On June 14, 2019, Petitioners filed the Petition for Review in this case with the Board, challenging Ordinance 19-0481.
- On June 17, 2019, the City of Kenmore was served with the Petition.

III. ANALYSIS

Applicable Law:

RCW 36.70A.270 - Growth management hearings board—Conduct, procedure, and compensation. The growth management hearings board shall be governed by the following rules on conduct and procedure:

…

(7) All proceedings before the board, or any of its members, or a hearing examiner appointed by the board shall be conducted in accordance with such administrative rules of practice and procedure as the board prescribes. The board shall develop and adopt rules of practice and procedure, including rules regarding expeditious and summary disposition of appeals and the assignment of cases to regional panels. The board shall publish such rules and decisions it renders and arrange for the reasonable distribution of the rules and decisions.

WAC 242-03-230(2) Service of petition for review. (a) A copy of the petition for review shall be served upon the named respondent(s) and **must be** received by the respondent(s) **on or before the date filed with the board.** Service of the petition for review may be by mail, personal service, or a commercial parcel delivery service, **so long as the petition is received by respondent on or before the date filed with the board.**…

(4) The board may dismiss a case for failure to **substantially comply** with this section.

WAC 242-03-240 Filing and service of all other papers.

(2) Service: Parties shall serve copies of all filings on all other named parties by electronic mail, **on or before the date filed with the board**, unless a party lacks technical capability. Service is accomplished when the document is transmitted electronically, or, by agreement

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among the parties or exception granted by the presiding officer, is postmarked or commercially sent by the required date.

WAC 242-03-555 Dispositive motions. (1) Dispositive motions on a limited record to determine the board's jurisdiction, the standing of a petitioner, **or the timeliness of the petition are permitted**. The board rarely entertains a motion for summary judgment except in a case of failure to act by a statutory deadline.
[Emphasis added.]

Position of the Parties

The City's Motion asks the Board to dismiss the case because the Petitioners failed to serve the City in accordance with WAC 242-03-230(2)(a) which requires that service "must be received by the respondent(s) **on or before the date filed with the board**." The regulation permits service "by mail, personal service, or a commercial delivery service, so long as the petition is received by the respondent **on or before the date filed with the board**." [Emphasis added.]

The City states, and the Petitioners do not dispute, that while the petition was filed with the Board on June 14, 2019,[1] the City did not receive the petition until June 17, 2019.

The City argues that failure to comply with the Board's service requirements is a cause for dismissal, unless the Petitioners can show that they substantially complied. In this assertion, the City advances the analysis in *Your Snoqualmie Valley, et al. v. City of Snoqualmie* GMHB No. 11-3-0012 (Order on Motions, March 8, 2012) at 5. There, this Board applied the substantial compliance test used by federal courts in denying a motion to dismiss for failure of service which evaluates four criteria:

> "(a) [T]he party that had to be served personally had actual notice, (b) the [Respondent] would suffer no prejudice from the defect in service, (c) there is a justifiable excuse for the failure to serve properly, and (d) [Petitioner] would be severely prejudiced if [its Petition] were dismissed."[2]

Substantial compliance is a question of fact, dependent on the facts of a particular

[1] Prehearing Order at 3.
[2] *Your Snoqualmie Valley, et al. v. City of Snoqualmie,* GMHB No. 11-3-0012 (Order on Motions, March 8, 2012) at 5.

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case. The Board in *Your Snoqualmie Valley* found that the unannounced and early pre-Christmas closure of City Hall occasioned the late service. "There was a justifiable excuse for failure to serve properly."[3] Further, the board noted that "the obstacle was of the City's making, not a result of Petitioners' misjudgment." The Board noted that the City acknowledged that it had actual notice and so assertions of prejudice would not be reasonable on these facts.[4] The Board made no observation concerning the prejudice to Petitioner on dismissal.

In summary, in denying the motion to dismiss, the Board found that the City had actual notice, and that there was a justifiable excuse for the failure to serve properly.

Here, the City asserts, and provides a declaration in support of, the proposition that the City had no actual notice until the June 17 service.[5] Further, they point out that Petitioners offer no justifiable excuse, such as was the case in *Your Snoqualmie Valley*.

During the Prehearing Conference, as stated in the Prehearing Order, the Respondent City of Kenmore did indicate its intention to file a dispositive motion. [6] The Motion is supported by the declaration of the City Clerk, which states that the Petition was received by the City on June 17, 2019, that the City was not aware of this action until served, and that the City was open regular business hours on June 10 and thereafter for proper service. [7]

The Petitioners do not dispute failing to meet the rule, offer no justifiable excuse for having failed to meet the rule, but opposes the Motion on four bases:

(1) The motion was not identified in the Prehearing Order. This assertion is factually untrue, as the Prehearing Order clearly states: "Dispositive motions: Respondent does anticipate dispositive motions."[8] Additionally, there is no requirement that a declaration of the possibility of a dispositive motion be made in the Prehearing Conference, nor would the absence of such declaration preclude a properly filed dispositive motion.

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[3] *Id.* at 6.
[4] *Id.* at 6.
[5] City's Motion at 5.
[6] Prehearing Order at 1.
[7] Declaration of Kenmore City Clerk Kelly Chelin pp. 1-2.
[8] *Ibid.* fn. 3.

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(2) There is no precedent for an interpretation of WAC 242-03-230(2) to require dismissal. Petitioners assert that the City's reliance on *Your Snoqualmie Valley* is inappropriate. "In essence, the City asks the board to penalize Petitioners for filing with the Board one day early and shorten the statutory 60 day statute of limitations. There is no support for such an extreme rule."[9] The Board observes that the assertion of "no support" is factually untrue, as the 60 day statute of limitations is uncharged and the regulation requiring contemporaneous or prior service exists in law.[10]

(3) **WAC 242-03-230(4) provides for substantial compliance**. Petitioners rely on the regulation's provision that "[t]he board may dismiss a case for failure to **substantially comply** with this section" and claims that they have substantially complied with it. In support of that assertion, they point out that there is no prejudice to the City here and that dismissal is a "drastic result."[11]

Petitioners argue the federal criteria used by the Board in *Your Snoqualmie Valley* do not supply an appropriate legal analysis. Those criteria, Petitioners claim, are addressing a filing deadline and not, as here, a rule concerning the order of filing and service, i.e., failing to abide by the language specifying service "on or before the date filed with the board." And yet, while distinguishing the context of the use of these criteria in evaluating substantial compliance, the Petitioners wish to be absolved of its failure to properly serve the petition by arguing that WAC 242-03-230(4) provides for substantial compliance. Petitioners rely on a different approach to determining substantial compliance, based on ascertaining the objective of the regulation and whether that objective was met. This is in accordance with the general legal definition of substantial compliance:

> compliance with the substantial or essential requirements of something (as a statute or contract) that satisfies its purpose or objective even though its formal requirements are not complied with.[12]

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[9] Petitioners' Opposition to Motion for Summary Judgment at 4.
[10] Analysis of the requirements that would save the petition by analogy to Federal cases is not addressed here, as the Board in *Your Snoqualmie Valley* found them helpful but "not directly applicable."
[11] Petitioners' Opposition to Motion for Summary Judgment at 7.
[12] https://www.merriam-webster.com/legal/substantial%20compliance

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Petitioners suggest that the objective of the regulation is "obtaining notice, notice within a reasonable time and avoiding unnecessary delay in the resolution of this case,"[13] but offers no legal argument for why we should accept that objective as being the right objective for this regulation's requirement of service "on or before" filing of the petition with the Board.

Petitioners cite two cases in support of its argument that substantial compliance saves this case, but fails to note some important differences in the facts in one case and misstates the holding in the second one. In *City of Port Orchard v. Kitsap County*, GMHB No. 16-3-0012, this Board noted that the respondent in that case did have actual "full and immediate" knowledge of the filing,[14] a fact missing in this scenario. Petitioners cite *Salisbury v. City of Bonney Lake*, GMHB No. 95-3-0058, Order Granting Bonney Lake's Motion to Dismiss, for the proposition that a 9 or 10 day delay is not grounds for dismissal.[15] Yet, that case held that the petition was not properly or timely served and the City's Motion to Dismiss was granted,[16] so Petitioners are inaccurate in use of the citation. The Board is not persuaded that the holding in either of these cases remotely supports the Petitioners' claim to substantial compliance.

(4) **The Board has no authority to adopt a rule that Petitioner must be served before it is filed.** The Petitioners remind us that administrative agencies only have authority to promulgate rules if such power is expressly granted or necessarily applied from statutory grants of authority. "The City's interpretation of WAC 242-03-230 means that – as a jurisdictional matter – the legislature's 60 day deadline is shortened if a petitioner files early," thus creating a "moving deadline" in conflict with RCW 36.70A.290.[17] Petitioners misstate the proposition made by the City; the City is not citing RCW 36.70A.290 for the authority to promulgate WAC 242-03-230. The Board's jurisdiction to develop substantive procedural rules appears in RCW 36.70A.270.

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[13] Petitioners' Opposition to Motion for Summary Judgment at 5.
[14] *City of Port Orchard v. Kitsap County*, GMHB No. 16-3-0012 (Order on Motion, November 14, 2016) at 2.
[15] Petitioners' Opposition to Motion for summary Judgment at 7.
[16] *Salisbury v. City of Bonney Lake*, CPSGMHB No. 95-3-0058 (Order Granting Motion, October 27, 1995) at 4.
[17] *Id.* at 8.

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The Respondent City of Kenmore was served within 60 days of the date of the Petitioner's filing of the Petition and the provision of RCW 36.70A.290 requiring filing within 60 days of publication is met; however, the City was not served "on or before the date filed with the Board," as required by WAC 242-03-230(2), a procedural rule established under RCW 36.70A.270. The statutory deadline did not move. The service requirement was not met.

Petitioners attempt to argue that the regulation somehow shortens the legislature's 60-day deadline "if a petitioner files early,"[18] and thus "conflicts with RCW 36.70A.290 and is therefore beyond the scope of the Board's authority."[19] This argument fails because it is not the decision to "file early" that creates the failure of service under WAC 242.030230; the error is in the choice to file with the Board without at least simultaneous service on the Respondent.

The language of this regulation, specifying the order of filing and service, "on or before the date filed with the Board," appears twice in WAC 242-03-230(2). It appears again in WAC 242-03-240, concerning the filing of all other papers in the case. The specification of the order of service has been a part of the Board's procedural rules for twenty-five years.

The opposition to the City's motion for dismissal from the Petitioners ignore the plain language of the GMHB rules of practice and procedure that every attorney practicing before the Board should be prepared to comply with, unless a justifiable excuse, as in *Your Snoqualmie Valley*, or substantial compliance is present in the facts of that particular case. Here, the Petitioners cannot demonstrate any reason why the City was not served in a timely manner, any explanation for their failure to meet the requirements of the regulation, relying instead on arguments that are factually untrue or on cases that do not apply.

The service provisions in the Board's rules are jurisdictional, not just procedural,[20] and absent effective service, the Board has no authority and the case must be dismissed.

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[18] Petitioners' Opposition to Motion for Summary Judgment at 8.
[19] Petitioners' Opposition to Motion for Summary Judgment at 8.
[20] *Sky Valley and Dwayne Lane v. Snohomish County*, CPSGMHB No. 98-3-0033c (Order Granting Motion to Dismiss, January 20, 1999) at 2-3.

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Prejudice

The Petitioners here rely heavily on arguments involving the concepts of prejudice, either the failure of prejudice to the Respondent or the presence of prejudice to the Petitioners on these facts. Prejudice does appear in the evaluative criteria suggested by the federal court analogy and used by the Board in *Your Snoqualmie Valley.* To repeat, those criteria are:

> "(a) [T]he party that had to be served personally had actual notice, (b) the [Respondent] would suffer no prejudice from the defect in service, (c) there is a justifiable excuse for the failure to serve properly, and (d) [Petitioner] would be severely prejudiced if [its Petition] were dismissed."[21]

In the case before us here, as in *Your Snoqualmie Valley*, the question of (a) actual notice, and (c) justifiable excuse appear in and are central to the Motion. The question of prejudice, as it appears in (b) and (d) of the federal evaluative criteria, does not appear to come up in any of the Board cases cited by the parties, appears largely as an observation or *dicta*, and doesn't provide a single holding in any Board case dealing with dismissal. The dismissal of a case is clearly prejudicial to the non-moving party, but this Board has seen fit to dismiss cases for failure to follow the WACs governing practice before this Board, including service, in many cases on a variety of facts.

In *Salisbury v. Bonney Lake*, CPSGMHB No. 95-3-0058 (Order Granting Bonney Lake's Motion to Dismiss, October 27, 1995) the City was served 10 days after filing with the Board. The Board in that case appears to have been interpreting the language of WAC 242-03-230(1) at that time which required "prompt" service after filing. The Board found that the nine or ten day delay was not timely and dismissed the case.

In *City of Tacoma v. Pierce county*, CPSGMHB No. 06-3-0011c (Order on Motion to Dismiss and Order on Intervention, May 1, 2006) the issue revolved around precisely who could effectively receive service, and the Board noted that even with notice of the Board's rules, the Petitioner in that case had made no attempt to comply with the rules. The Board

[21] *Your Snoqualmie Valley, et al. v. City of Snoqualmie*, GMHB No. 11-3-0012 (Order on Motions, March 8, 2012) at 5.

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noted that "Petitioner's attorney should be aware that there is significant Board precedent for this Board's dismissal of a PFR for improper service; however, improper service has been a rare event in the CPS region since the millennium."[22]

In none of these cases is the prejudice to the Respondent or the Petitioner considered central to or germane to resolving the issue of procedural compliance and the suitability of dismissal.[23] Every case concerning sufficiency of service is dependent on a particular and unique set of facts, as is this case. The Board is persuaded that the Petitioners failed to serve the City in a timely manner, and the case should be dismissed.

Motion to Dismiss Issue 3

The City also brings a motion for dismissal of Legal Issue 3 on the grounds that it is a collateral attack on a prior City action. The Board does not reach this issue, as it dismisses the case on procedural grounds.

Findings and Conclusions

The Board finds that the Petitioners filed the petition for review electronically with the Board on June 14, 2019, at 2:37 pm, a Friday, and that the mailed copy subsequently received by the Board was postmarked June 14, 2019.

The Board finds that WAC 242-03-230(2)(a) requiring service of the petition for review on the respondent "on or before the date filed with the board" and "so long as the petition is received by respondent on or before the date filed with the board " are applicable to the facts in this case.

The Board finds that the City was served on June 17, 2019, a Monday, after the petition was filed with the board, and was open regular business hours, i.e., 9 a.m. to 5 p.m., on weekdays prior to this date and fully available for service.

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[22] *City of Tacoma v. Pierce County*, CPSGMHB No. 06-3-0011c (Order on Motion to Dismiss and Order on Intervention, May 1, 2006) at 5.

[23] Accord. *Sky Valley, et al., v. Snohomish County,* CPSGMHB No. 95-3-0068 (Order on Dispositive Motions, January 8, 1996); *Keesling v. King County*, CPSGMHB No. 95-3-0078, (Order Granting Motion to Dismiss for Lack of Timely Service, March 8,1996); *Whidbey Environmental Action Network v. Island County*, WWGMHB No. 06-2-0027 (Order on Motion to Dismiss Petition for Review, November 16, 2006); *Abercrombie v. Chelan County,* EWGMHB No. 00-1-0008 (Order on Dispositive Motions, June16, 2000).

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The Board finds that there is no evidence that the Respondent had actual knowledge of the action, nor that the Petitioners made any effort to comply with the regulation requiring prior or contemporaneous service to the Respondent**,** nor that the doctrine of substantial compliance applies to these facts.

The Board concludes that the Petitioners failed to serve the City of Kenmore in a timely manner as required by WAC 242-03-230.

IV. ORDER

The City of Kenmore's motion for Summary Judgment is granted. The Case is dismissed.

DATED this 29th day of August 2019.

Bill Hinkle, Presiding Officer

Deb Eddy, Board Member

See Dissent
Cheryl Pflug, Board Member

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Dissent of Board Member Pflug

Because I believe the Board's rules and court authority set forth a standard for determining adequacy of service under the GMA as (1) whether there was strict compliance with statutory requirements; (2) whether there was "substantial" compliance with procedural rules; and (3) whether there was prejudice to the other party, I respectfully dissent.

Facts

The Petitioners challenge a City action[24] published on April 18, 2019. Given the statutory requirement that requests for review be filed within 60 days of publication to the action, Petitioners' petition for review (PFR) to the GMHB needed to be filed by June 17, 2019. The Board received Petitioners electronically submitted PFR on June 14, 2019, at 2:37 pm, a Friday. The mailed copy of the PFR received by the Board was also postmarked June 14, 2019. The Declaration of Service attached to the PFR attests that "[o]n June 14, 2019, [Petitioners' counsel] caused a true copy of the foregoing Petition for Review and this Declaration of Service to be served on the … [City Manager via legal messenger]."[25] In response to the City's motion to dismiss, Petitioners again declare that the PFR was delivered to a legal messenger service on June 14, 2019, to effectuate delivery to the City,[26] and provide a copy of the Declaration of Service of Petition for Review showing that service on the City was ultimately accomplished on Monday, June 17, 2019, at 1:19 pm.[27]

Statutory requirement

In establishing the program to review government actions taken to comply with the Growth Management Act, Chapter 36.70A RCW, the legislature established the limited jurisdiction of the Board. Compliance with the procedural requirements of the GMA is necessary in order to invoke the Board's jurisdiction. Those requirements are met when a person with standing, as defined by the GMA:

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[24] Ordinance No. 18-0476.
[25] Decl. of Service attached to PFR.
[26] Stephens Decl. at 2.
[27] Decl. of Timothy Peterson, Reg. #9307747, King County.

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1. Files a petition for review including a detailed statement of the issues presented for Board resolution;

2. Files the petition for review within 60 days following publication of adoption by the adopting jurisdiction's legislative body;

3. Alleges in the petition for review that the action taken by the jurisdiction fails to comply with GMA requirements.[28]

Under the Board's Rules of Practice and Procedure, dispositive motions on a limited record to determine the Board's jurisdiction, the standing of a petitioner, or the timeliness of the petition are permitted.[29] The Board rarely entertains a motion for summary judgment except in a case of failure to act by a statutory deadline.[30] Additionally, the Board may dismiss a frivolous petition.[31]

Here, Petitioners' standing is undisputed, there is no allegation that the PFR is frivolous, and the PFR was filed 57 days after the publication of the challenged action – *i.e.,* within the statutory period. The statute sets forth no requirement for service of the respondent,[32] and the City does not allege that Petitioners have failed to comply with the statute. Petitioners have strictly complied with the *statutory* requirements necessary to invoke the Board's jurisdiction.

Procedural rules

Although the statute sets forth no requirement for service of the respondent, the Board used the rule-making authority conferred under RCW 36.70A.270(7) to set

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[28] RCW 36.70A.280 and RCW 36.70A.290.

[29] WAC 242-03-555 Dispositive motions. (1) Dispositive motions on a limited record to determine the **board's jurisdiction**, **the standing of a petitioner**, or the **timeliness of the petition** are permitted. The board rarely entertains a motion for summary judgment except in a case of failure to act by a statutory deadline. (2) Dispositive motions and responses shall be filed by the dates established in the prehearing order. The board may refuse to hear a motion that is not timely filed, except where good cause is shown. (3) The presiding officer, taking into consideration the complexity and finality of the issues raised, may, in the presiding officer's discretion, request a reply brief from the moving party, schedule a telephonic hearing for argument of the motion or may defer the board's consideration of the motion until the hearing on the merits.
(4) Unless the order on dispositive motions is a final order pursuant to WAC 242-03-030(9), no motion for reconsideration will be allowed.

[30] WAC 242-03-555.

[31] RCW 36.70A.290(3).

[32] *Id.*

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procedures governing practice and procedure before the Board, *inter alia,* service. WAC 242-03-230(2)(a) provides that a petitioner shall serve the respondent(s) *on or before* the date filed with the board. The Board's rule goes on to state that the board "*may* dismiss a case for failure to *substantially* comply with this section." The Boards' rules cannot, however, elevate a procedural service directive to a jurisdictional requirement.[33]

The City admonishes that the Board should look to the substantial compliance test used by federal courts to determine whether Petitioners have complied with the Board's procedural rules. However, Washington courts have looked to Washington civil rules to determine how procedural rules impact a petitioner's ability to invoke the jurisdiction of an administrative tribunal.

To begin, over the many years since legislative enactment of civil rules of procedure, the Washington Supreme Court has determined that:

> The basic purpose of the new rules of civil procedure is to eliminate or at least to minimize technical miscarriages of justice inherent in archaic procedural concepts once characterized … as 'the sporting theory of justice.' Thus, whenever possible, the rules of civil procedure should be applied in such a way that substance will prevail over form.[34]

Thus the Washington Supreme Court has long distinguished between the standard of strict compliance applicable to statutory requirements, and the standard of *substantial* compliance applicable to regulatory requirements. *See, e.g., Crosby v. Spokane,*[35] in which the Court observed that:

> The doctrine of substantial compliance … has been applied when determining compliance with notice of appeal requirements under the industrial insurance act, RCW 51.51.110. *In re Discipline of Saltis,* 94 Wn.2d 889, 621 P.2d 716 (1980).

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[33] *See First Fed. Sav. & Loan Ass'n v. Ekanger,* 93 Wn.2d 777, 781, 613 P.2d (1980) (*quoting* Curtis *Lumber Co. v. Sorto,* 83 Wn.2d 764, 767, 522 P.2d 822 (1974)).

[34] First Fed. Sav. & Loan Ass'n v. Ekanger, 93 Wn.2d 777, 781, 613 P.2d (1980 (quoting Curtis Lumber Co. v. Sorto, 83 Wn.2d 764, 767, 522 P.2d 822 (1974).

[35] *Crosby v. Spokane County,* 137 Wn.2d 296, 301, 971 P.2d 32 (1999).

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"Substantial compliance has been defined as actual compliance in respect to the substance essential to every reasonable objective of [a] statute."[36]

At common law, service of process is the mechanism by which one party gives another party notice that legal action has been initiated so that the challenged party is able to respond to the proceeding. Thus, under the grant of rule-making authority conferred by RCW 36.70A.270, the Board adopted regulations governing, *inter alia,* service. The Board's enabling statute does not allow it to delay the case calendar until the respondent has been served. Thus, in order to meet its statutory obligation to render a decision within 180 days, the Board has adopted rules *the purpose of which are to insure it accomplishes that mandate*.[37]

The Board's rules require that it issue a notice of hearing within 10 days of receipt of a PFR[38] and hold a Prehearing Conference 21 days after the filing of the PFR.[39] A respondent must file its Index of the Record within 30 days *of being served*,[40] after which a petitioner has a specific time to review the record before the deadline for motions to supplement. Particularly in an administrative proceeding based solely on the record,[41] motions to supplement and dispositive motions must be presented and decided expeditiously so that the parties can meet their briefing deadlines. Therefore, in order for the case to proceed, it is important for the respondent to have prompt notice that a challenge has been filed. For example: if a PFR was filed 40 days after publication of an action, but the respondent was not served until the 60th day, that respondent would likely first learn of the challenge when it received the Board's notice of hearing and have only 11 days to

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[36] *Continental Sports Corp. v. Department of Labor & Indus*, 128 Wn.2d 394, 602, 91- P.2d 1284 (1996) (quoting *City of Seattle v. Public Employment Relations Com*, 116 Wn.2d 923, 928, 809 P.2d 1377 (1991) (quoting In re Writ of Habeas Corpus of Santore, 28 Wn. App. 319, 327, 623 P.2d 702 (1981)))).

[37] WAC 242-03-035 provides that "[w]here a time frame is different in these rules from those in chapter 10-08 WAC, it is because the board is required to act pursuant to the time frames set forth in the act. Chapter 10-08 WAC sets forth the Model Rules of Procedure for Administrative Hearings. **The model rules provide that "[s]ervice by commercial parcel delivery shall be regarded as completed upon delivery to the parcel delivery company, properly addressed with charges prepaid." WAC 10-08-110.**

[38] WAC 242-03-500.

[39] Unless otherwise scheduled in the notice of hearing. WAC 242-03-535.

[40] WAC 242-03-510.

[41] RCW 36.70A.290(4) reads, in pertinent part, "The board shall base its decision on the record developed by the city…"

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obtain counsel to appear at the hearing (many smaller jurisdictions do not employ full time counsel). The Board desires to prevent such a *potentially* prejudicial situation. However, the Board's rule does *not* require that the case be dismissed *unless* a petitioner fails to substantially comply.[42] In other words, the Board's rule is not a technical booby trap to deprive a party of redress.

As emphasized by the State Supreme Court, "[p]ublic policy favors allowing a citizen to have your day in court…" The City's argument that service on or before the date of filing a challenge is a *jurisdictional* requirement is at odds with the statutory language of the GMA, inconsistent with the purpose and language of the Board's rules,[43] and conflicts with the Supreme Court's direction that rules should place substance over form to the end that cases be resolved on the merits.[44] Sound public policy favors the adjudication of controversies on their merits rather than their dismissal on technical procedural grounds.[45]

The City overlooks WAC 242-03-555(1) which states that "[t]he board rarely entertains a motion for summary judgment except in a case of failure to act by a *statutory* deadline." The important rationale behind this rule is that the Board is required to render its decision in 180 days, regardless of the number of other cases pending and without any additional legal resources. Excessive motions practice aimed at dismissal on technical grounds or, as the Supreme Court put it, "a sporting theory of justice," is not helpful to the Board in efficiently deciding cases.

In sum, the Board must determine whether a petitioner has complied with the regulatory purpose of the procedural rule by looking to the purpose of the WAC, which is to insure that the Board accomplishes its mission to decide the case within the required 180 days *from the date of filing.* Here, Petitioners accomplished service the day *after* filing with the Board, within the 60-day deadline.[46] The City obtained counsel, who appeared within

[42] WAC 242-3-230(4) provides that it may only dismiss if "substantial compliance" is not found.
[43] *See Griffith v. City of Bellevue,* 130 Wn.2d 189, 192, 922 P.2d 83 (1996).
[44] *Crosby v. Spokane Co.,* 137 Wn.2d 296, 303, 971 P.2d 32 (1999) (citing Griffith, 130 Wn.2d, 189, 192-193.)
[45] *See Crosby v. Spokane Co.,* 137 Wn.2d 296, 301, 971 P.2d 32 (1999).
[46] The Board received a notice of appearance from the City's counsel on June 19, 2019.

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two days and participated, fully-prepared, in the prehearing conference.[47] Petitioners complied with "every reasonable objective" of the Board's procedural rules.

The Board should find that Petitioners substantially complied with WAC 242-03-230.

Prejudice

The City does not attempt to explain how failure to receive service by close of business Friday prejudiced the City in responding to this case. Instead, the City argued the Board should dismiss the Petition unless the Petitioners were able to satisfy all of the following four requirements which it paraphrased from *Your Snoqualmie Valley*:

> "(a) the party that had to be served personally had actual notice, (b) the [Respondent] would suffer no prejudice from the defect in service, (c) there is a justifiable excuse for the failure to serve properly, and (d) [Petitioner] would be severely prejudiced if [its Petition] were dismissed." … Petitioners cannot meet requirements a and c, and as such the Petition *must* be dismissed.[48]

In asserting that Petitioners could not prove (a) or (c), the City tacitly acknowledges that it suffered no prejudice (b) and that Petitioners would be severely prejudiced (d) if the City's motion were granted. Further, the City's use of *must* where the WAC uses *may* misstates the Board's rule, and the City's assertion that the Petitioners were required to serve the City *prior* to filing with the Board also misrepresents WAC 242-03-230 and -240, which specifies respondent(s) be served *on or before the date* the PFR is filed with the Board.[49]

The Board should find that there was no prejudice to the City as a result of the defect in service.

Precedent

Petitioners assert that there is no prior Board decision supporting dismissal of a PFR

[47] (Prehearing Order, July 23, 2019) at 1.
[48] Motion for Summary Judgment at 4-5 (citing *Your Snoqualmie Valley, et al., v. City of Snoqualmie,* GMHB Case No. 11-3-0012 (Order on Motions, March 8, 2012) at 5. Italics added.
[49] WAC 242-03-230(2)(a) and -240.

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filed one day late, citing *Your Snoqualmie Valley*.[50] In that case, the petitioners served the City five days late after finding the City, *inter alia,* closed for Christmas and the Board found that service was effective and, as here, still within the 60-day deadline. The City attempts to distinguish the situation before us from *Your Snoqualmie Valley* by pointing out that the Petitioner failed to offer a justifiable excuse, but that point is inapposite where the City hasn't shown that the regulation requires a justifiable excuse. As discussed above, Petitioners did respond with evidence that timely service was attempted and thwarted by the inability of the legal messenger to reach the City the same day.

In sum, this case is more like *Your Snoqualmie Valley,* in which the City received notice that a challenge had been initiated within 60 days from the date of publication of the challenged action and the Board determined that the delay was not prejudicial to the City, which could not be served because of the holiday. As in *Your Snoqualmie,* the City was not available over the weekend and thus the delay in service was inconsequential.

Conclusion

The Petitioners did not fail to serve the City but, rather, served the City the next business day; and the City makes no claim that it has been prejudiced in any way. The City has not carried its burden to show that the Petitioners failed to substantially comply with WAC 242-03-555.

I would find and conclude that Petitioners substantially complied with WAC 242-03-230 and -240 and deny the City's motion for summary judgment.

Cheryl Pflug, Board Member

[50] *Your Snoqualmie Valley, et al. v. City of Snoqualmie* GMHB No. 11-3-0012 (Order on Motions, March 8, 2012).

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